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January 14, 2004

Michael K. Powell, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony  
Services Are Exempt from Access Charges, WC Docket No. 02-361;

Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an  
Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211;

Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c)  
from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b),  
WC Docket No. 03-266.

Dear Chairman Powell:

On behalf of SBC Communications, Inc. (SBC), I am writing to urge the Commission to promptly deny AT&T's petition for a declaratory ruling that, under the Commission's existing rules, AT&T is exempt from paying access charges on ordinary long-distance voice traffic that AT&T transports over its Internet Protocol (IP) backbone.<sup>1</sup> As explained below and in a more detailed memorandum attached hereto, AT&T's petition -- which has now been pending for 15 months -- raises no new or complex issues. To the contrary, the resolution of AT&T's petition requires only a straightforward application of the Commission's existing access charge rules to a form of long distance service provided by AT&T.

SBC recognizes that the Commission is planning to initiate a rule making proceeding to consider the appropriate regulatory treatment of Voice over Internet Protocol (VoIP) services. SBC wholeheartedly supports that proceeding and, more generally, the goal of a competitive, minimally regulated environment for the Internet. But AT&T's petition has nothing to do with regulating the Internet, notwithstanding that AT&T claims to put what is in every respect ordinary circuit-switched voice traffic on its IP backbone for some distance. In fact, AT&T's "IP-in-the-middle" transport technology is not a service at all. It is *completely invisible* to

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<sup>1</sup> Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket 02-361 (Oct. 18, 2002) (AT&T Petition).

AT&T's customers, who continue to receive plain old telephone service and have no idea whether their long-distance calls are being carried by AT&T over its IP backbone. Thus, far from implicating regulation of the Internet, AT&T's petition is about nothing more than whether AT&T can line its own pockets by breaking the Commission's rules.

In this respect, AT&T's long distance service is vastly different from the services identified in the petitions filed by Vonage Holdings Corporation (Vonage) and Level 3 Communications LLC (Level 3).<sup>2</sup> Unlike AT&T's long distance service, the services described by Vonage and Level 3 may originate and/or terminate in IP, may involve a net change in protocol, and may present unique issues associated with the application of access charges. Moreover, Vonage's petition asks only for the Commission to preempt the Minnesota Public Utilities Commission from regulating Vonage's service.<sup>3</sup> It does not address any of the discrete access charge issues raised by AT&T. While Level 3's petition does address access charges, the petition was only recently filed and the Commission has barely begun the process of building a record on that petition.

By contrast, the Commission has an extensive record on the narrow issue raised in AT&T's petition -- the applicability of the Commission's *existing* access charge rules to the long distance service offered by AT&T. If the Commission wants to change those rules in the future, it could certainly raise that possibility in the upcoming VoIP proceeding. However, in the interim there is no reason for the Commission to avoid the issue of what its existing rules require. Indeed, parties on all sides of this issue are imploring the Commission to rule now to fill in the regulatory void created by AT&T's petition.<sup>4</sup> Ducking the issue will only encourage parties to fill that void by taking the law into their own hands -- a state of affairs the Commission would do well to avert. AT&T and others will continue to expand their access avoidance activities, leaving those affected with no choice but to seek out alternative means to stop these unlawful activities. The turmoil resulting from the Commission's failure to act poses a serious threat to the entire access charge regime -- a regime that is critical for supporting universal access to the vital communications services that consumers and business rely on everyday. For the reasons

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<sup>2</sup> Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211 (Oct. 27, 2003); Level 3 Communications LLC Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of 47 U.S.C. § 251(g), Rule 51.701(b)(1), and Rule 69.5(b), WC Docket No. 03-266 (Dec. 23, 2003).

<sup>3</sup> The United States District Court of the District of Minnesota has already effectively granted Vonage the relief it seeks from the Commission. *Vonage Holdings Corp. v. Minnesota Public Utilities Comm'n*, 2003 WL 22567645 (D. Minn. 2003). Accordingly, the Commission should dismiss Vonage's petition as moot.

<sup>4</sup> Ex Parte Letter from David Sieradzki, WilTel, to Marlene Dortch, FCC, WC Docket No. 02-361 (Dec. 3, 2003) ("[C]ompanies need an answer *now* so they can conduct their business on an informed and lawful basis. . . . What the FCC must not do is continue leaving companies to guess -- and litigate -- over what rules apply."); Ex Parte Letter from Thomas Jones, Time Warner Telecom, to Marlene Dortch, FCC, WC Docket No. 02-361 (Jan. 9, 2004) (the FCC should make a decision "as soon as possible; the longer the agency waits to make a decision, the more intractable and costly the disputes will become."); WorldCom Comments, WC Docket No. 02-361 at 6 (Dec. 18, 2002) ("The FCC should promptly resolve the policy questions raised by AT&T's petition."); American Internet Service Providers Association, et al Comments, WC Docket No. 02-361 at 3 (Jan. 24, 2003) (the FCC should act "expeditiously" on AT&T's petition); NECA Reply Comments, WC Docket No. 02-361 at 6 (Jan. 24 2003) (the FCC should "dismiss[] the AT&T petition promptly.").

discussed below, the Commission must put an immediate end to AT&T's blatantly unlawful activities before they do irreparable damage to that regime and all of the important services that depend on it.

*AT&T Is Flagrantly Violating the Commission's Rules by Failing to Pay Access Charges.*

Rule 69.5(b) provides that access charges "shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."<sup>5</sup> AT&T has *admitted* to the Commission that the "IP-in-the-middle" long distance service described in its petition is, in fact, an interstate telecommunications service and that AT&T uses LEC switching facilities to provide this service.<sup>6</sup> Despite these uncontested facts, AT&T is refusing to pay access charges to terminate its IP-in-the-middle long distance calls.<sup>7</sup> Thus, by its own admissions, AT&T is violating Rule 69.5.

*The Report to Congress Does Not Excuse AT&T's Unlawful Access Charge Avoidance.*

Based on a single sentence taken out of context, AT&T erroneously claims that the Commission created an exemption from Rule 69.5 in the *Report to Congress*.<sup>8</sup> The *Report to Congress*, however, did not as a matter of fact, and could not as a matter of law, create an exemption from the Commission's access charge rules. Rather, in the *Report to Congress*, the Commission observed that phone-to-phone IP telephony appears to be a telecommunications service and noted that telecommunications service providers are required, among other things, to pay access charges.<sup>9</sup> The Commission went on to express concerns that future technological changes may blur distinctions between its tentative definitions of phone-to-phone and computer-to-computer IP telephony and that determining the jurisdictional nature of IP telephony for access charge purposes may be challenging, both of which it would address in a future proceeding.<sup>10</sup> But nowhere in the *Report to Congress* did the Commission ever suggest that it was in any way altering its long-standing access charge rules.

Even if the Commission had intended to alter its access charge rules, the *Report to Congress* did not provide a legal basis for doing so. The *Report to Congress* was neither a rule making proceeding nor a forbearance proceeding; it was not preceded by a Commission notice indicating that changes to the access charge rules were being considered; it does not contain ordering clauses or an appendix of revised rule sections; and a summary of the *Report to*

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<sup>5</sup> 47 C.F.R. § 69.5(b) (emphasis added).

<sup>6</sup> AT&T Petition at 4, 8-11, 17-19, 32-33; AT&T Reply Comments at 2.

<sup>7</sup> AT&T Petition at 18-19.

<sup>8</sup> See AT&T Petition at 25-26; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (1998) (*Report to Congress*).

<sup>9</sup> Report to Congress, ¶¶ 89, 91.

<sup>10</sup> *Id.* ¶¶ 90, 91.

*Congress* was not published in the Federal Register. These omissions belie any claim that the *Report to Congress* could have lawfully created an exemption from Rule 69.5.

*As a Matter of Law, AT&T's Access Charge Obligations Apply Prospectively and Retroactively.*

In addition to declaring that AT&T must prospectively paying access charges on its IP-in-the-middle long distance service, the Commission must not, as a matter of law, absolve AT&T from paying for the past-due access charges it has unlawfully avoided. Judicial precedents make clear that, when an agency applies an existing rule (Rule 69.5) to a new set of facts (AT&T's IP-in-the-middle long distance service), there is a strong presumption in favor of retroactive application of that rule in order to make the parties whole.<sup>11</sup> This presumption may only be overcome if retroactive application would result in a "manifest injustice."<sup>12</sup> Under this standard, a party must demonstrate that it detrimentally and reasonably relied on an agency decision.<sup>13</sup> First, AT&T did not detrimentally rely on its misunderstanding of the *Report to Congress*. To the contrary, AT&T has publicly stated that it is deploying an IP network for reasons wholly unrelated to the *Report to Congress*.<sup>14</sup> Second, AT&T also could not reasonably rely on its misunderstanding of the *Report to Congress*. The Commission expressly declined to make "any definitive pronouncements" in the *Report to Congress*, and thus the *Report* falls well short of being a settled or well-established agency decision that courts require for reasonable reliance.<sup>15</sup>

*The Commission Must Deny AT&T's Petition Immediately to Prevent Further Destabilization of the Access Charge Regime.*

The Commission's access charge regime prescribes the means by which LECs recover a substantial portion of the costs of providing vital services to consumers and businesses. It would be highly destabilizing, not to mention patently inequitable, for the Commission to allow AT&T and others to deliberately avoid their clear and lawful obligation to pay access charges under that same regime. Without a timely Commission decision denying AT&T's petition, AT&T's access avoidance scheme will grow larger by the day. Indeed, AT&T has undertaken what it describes as a "massive transformation of the Voice Network to IP" and other carriers have announced similarly aggressive plans.<sup>16</sup> If the Commission does not put an immediate stop to AT&T's

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<sup>11</sup> See *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (and cases cited therein). See also Memorandum by SBC Communications, Inc., Urging the Commission to Deny AT&T's Access Charge Avoidance Petition at 9-17 (Jan. 14, 2004) (SBC Memorandum).

<sup>12</sup> *Id.*

<sup>13</sup> See *Garvey v. NTSB*, 190 F.3d 571, 584-85 (D.C. Cir. 1999); SBC Memorandum at 9-17.

<sup>14</sup> See SBC Memorandum at 13.

<sup>15</sup> See *supra* Verizon; SBC Memorandum at 9-17.

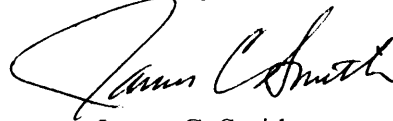
<sup>16</sup> Hossein Eslambolchi, AT&T CTO & CIO and President AT&T Labs, *Services over IP Network Evolution* at 9, attached to *Ex Parte* Letter from Pat Merrick, AT&T, to Marlene Dortch, FCC, CC Docket No. 01-92, et al (Nov. 5, 2003); B. Charny, *Vint Cerf Hears VoIP Calling*, CNET News.com, <http://news.com.com/2008-1082-5073025.html> (Sept. 10, 2003).

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unlawful access charge avoidance scheme, it will be issuing an open invitation for other carriers to build business plans on nothing more than irrational regulatory arbitrage, which will come crashing down when law or economic reality ultimately prevail. I strongly encourage the Commission to deny AT&T's petition without further delay.

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,



James C. Smith

Attachment

Cc: Commissioner Kathleen Abernathy  
Commissioner Michael Copps  
Commissioner Kevin Martin  
Commissioner Jonathon Adelstein  
Bryan Tramont  
Christopher Libertelli  
Matthew Brill  
Jessica Rosenworcel  
Lisa Zaina  
Daniel Gonzalez  
William Maher  
John Rogovin  
Jeffrey Dygert  
John Stanley  
Debra Weiner  
Paula Silberthau  
Jeffrey Carlisle  
Michelle Carey  
Tamara Preiss  
Jennifer McKee

**Memorandum by SBC Communications, Inc., Urging the Commission  
to Deny AT&T's Access Charge Avoidance Petition**

**WC Docket Nos. 02-361, 03-211 & 03-266**

**January 14, 2004**

SBC Communications Inc. ("SBC"), submits this memorandum in response to recent ex parte letters urging the Commission to grant AT&T's petition to exempt certain forms of phone-to-phone Internet Protocol (IP) telephony services from access charges.<sup>1</sup> These letters provide no factual, legal or policy basis for the Commission to take such an approach, or to "split the baby" by requiring that access charges be applied only prospectively to such services. As demonstrated below, (1) the services at issue in AT&T's petition are interstate telecommunications services, which have been and continue to be subject to access charges under the Commission's rules and well-settled precedent; (2) the Commission's 1998 *Report to Congress* did not – and could not – alter those rules so as to relieve carriers of their pre-existing obligations to pay access charges for such services; and (3) the Commission should not and may not lawfully circumscribe these obligations by holding that they apply only prospectively, but do not apply retroactively to services for which carriers have failed to pay access charges in the past. The Commission must therefore deny AT&T's petition. And it must do so immediately in order to put a stop to the rapidly growing practice by AT&T and other carriers of avoiding lawful access charges, which are a central component of the Commission's existing regime for compensating local exchange carriers for the use of their networks.

**(1) AT&T's So-Called Phone-to-Phone IP Telephony Service is an Interstate Telecommunications Service Subject to Access Charges.**

The Commission's access charge rules – which have been in place for two decades – specify the manner in which local exchange carriers (LECs) must be compensated when they provide interstate access services.<sup>2</sup> In particular, section 69.5(b) provides that:

Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.<sup>3</sup>

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<sup>1</sup> See, e.g., Ex Parte Letter from David Lawson, Counsel for AT&T, to Marlene Dortch, FCC, WC Docket No. 02-361 (Dec. 22, 2003); Ex Parte Letter from Robert Metzger, Counsel for CNM, to Marlene Dortch, FCC, WC Docket No. 02-361 (Dec. 1, 2003); Ex Parte Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene Dortch, CC Docket Nos. 01-92, WC Docket Nos. 02-361 & 03-211 (Nov. 25, 2003); Ex Parte Letter from Robert W. Quinn, AT&T, to Marlene Dortch, FCC, CC Docket Nos. 01-92, WC Docket Nos. 02-361 & 03-211 (Nov. 21, 2003).

<sup>2</sup> See 47 C.F.R. § 69.1(a) ("This part establishes rules for access charges for interstate or foreign access services provided by telephone companies on or after January 1, 1984.").

<sup>3</sup> 47 C.F.R. § 69.5(b) (emphasis added).

These carrier's carrier charges, also known as access charges, must be paid whenever an interexchange carrier uses a LEC's local exchange switching facilities to originate and/or terminate an interstate telecommunications service.<sup>4</sup> As discussed below, the service at issue in AT&T's petition is an interstate telecommunications service that uses local exchange switching facilities. Under the plain language of the Commission's long-established rules, AT&T is therefore required to pay access charges when it provides this service.

AT&T's petition centers on voice traffic that originates and terminates over the same circuit switches and in the same protocol (the Time-Division Multiplexing ("TDM") protocol), as the ordinary long distance voice traffic that AT&T has been providing for many decades.<sup>5</sup> The *only* difference between this traffic and traditional long-distance voice traffic is that AT&T transports this traffic for some distance between the originating and terminating LEC networks in an IP format.<sup>6</sup> Although the use of this "IP-in-the-middle" method of transporting traffic offers AT&T certain networking efficiencies, it is completely invisible to end users. Consumers are not required to purchase a broadband connection, a personal computer, or any new customer premises equipment to permit "IP-in-the-middle" transport. They are not required to change their dialing patterns, nor do they receive any added functionality. Rather they pay for and receive the exact same long distance service they received before. Indeed, consumers do not even know whether any particular call they place is carried by AT&T over its IP backbone. In this respect, AT&T's petition does not even depict a new service. Instead, AT&T's petition merely describes a different way for AT&T to haul traffic within its own network from point A to point B, an evolution that is directly analogous to earlier evolutions in transport technology -- from copper to microwave facilities to fiber. These earlier changes in the way long-distance carriers hauled their own traffic, of course, had no effect on their obligation to pay access charges, and neither does AT&T's deployment of "IP-in-the-middle."<sup>7</sup>

Section 69.5 by its very terms makes that crystal clear. As noted, that rule requires interexchange carriers to pay access charges when they use LEC switches to provide a telecommunications service. AT&T's IP-in-the-middle long distance service fits squarely within the statutory definition of a "telecommunications service." The 1996 Act defines a "telecommunication service" as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used."<sup>8</sup> The Act defines "telecommunications" as "the

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<sup>4</sup> See *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962, 12965-66 (2000) (discussing the history and applicability of access charges).

<sup>5</sup> Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket 02-361, at 10-11, 17-19 (FCC filed Oct. 18, 2002) ("*AT&T Petition*").

<sup>6</sup> *Id.* at 10-11, 18-19.

<sup>7</sup> The traffic that is the subject of AT&T's petition is accordingly very different from the Voice over Internet Protocol ("VoIP") services that AT&T has announced it would begin providing in 2004, and that companies such as Pulver.com and Vonage have been providing for some time. Those services require specialized customer premises equipment and a broadband connection; they originate -- and in some cases may terminate -- in the IP protocol. Those services do not in all cases rely on LEC switching and, to the extent they do, raise unique jurisdictional identification issues that should be considered in a comprehensive rulemaking proceeding. AT&T's "IP-in-the-middle" service, in contrast, raises no new issues and requires nothing more than a straightforward application of the Commission's existing rules.

<sup>8</sup> 47 U.S.C. §153(46).

transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received.”<sup>9</sup>

AT&T's service provides the transmission of voice calls, without change in the form or content of those calls as sent and received, to points specified by the user. AT&T is doing nothing more than performing two separate “protocol conversions” to its long distance traffic: one from TDM to IP, and the other from IP back to TDM. As a result, there is no “net” protocol change in the traffic. The traffic originates and terminates over LEC circuit switches in TDM format. Under settled precedent stretching back approximately 15 years, the FCC has consistently held that such “internetworking” protocol conversions occurring when traffic is handed off between networks that employ different transmission protocols – but that involve no “net user-to-user protocol conversion” – are “telecommunications services.”<sup>10</sup> There is accordingly no question that AT&T's IP-in-the-middle long distance service constitutes a telecommunications service under the Act.

Although some commenters in this proceeding have erroneously claimed that all voice services that use IP in some fashion qualify as information services,<sup>11</sup> AT&T itself has tellingly refused to adopt this unsupportable position. In fact, *AT&T has conceded on numerous occasions that long distance service using IP-in-the-middle is a telecommunications service*. For example, in describing the services at issue in its petition, AT&T states that they “often initially provide no net changes in protocol or content and thus constitute ‘telecommunications services’ under many definitions of that term”<sup>12</sup> AT&T also has admitted that it originates IP-in-the-middle calls over Feature Group D access lines and pays access charges to do so -- charges that, by definition, apply to telecommunications services that use local exchange switching facilities.<sup>13</sup> AT&T also has stated that it is including the revenues from its IP-in-the-middle traffic in its

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<sup>9</sup> *Id.* §153(43).

<sup>10</sup> See, e.g., *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 2 FCC Rcd 3072, ¶ 71 (1987) (holding that “internetworking” protocol conversions occurring when traffic is handed off between networks that employ different transmission protocols – but that involve no “net user-to-user protocol conversion” – are “basic” telecommunications services and not “enhanced” information services); *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 15 (1995) (“[P]rotocol conversions necessitated by the introduction of new technology are also outside the ambit of the enhanced services definition. This circumstance arises when innovative basic network technology is introduced into the network in a piecemeal fashion, and conversion equipment is used in the network to maintain compatibility with CPE.”); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 106 (1996) (“Non-Accounting Safeguards Order”); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 87 & n.187 (1998) (“Report to Congress”) (“Routing and protocol conversion within the network does not change this conclusion, because from the user's standpoint there is no net change in form or content.”).

<sup>11</sup> See, e.g., Reply Comments of the Information Technology Association of America at 4, WC Docket No. 02-361 (FCC filed Jan. 23, 2003) (“ITAA Reply Comments”) (“[U]nder current Commission rules, all voice-over-Internet services are classified as information services.”).

<sup>12</sup> Reply Comments of AT&T Corp. at 2, WC Docket No. 02-361 (FCC filed Jan. 24, 2003) (“AT&T Reply Comments”).

<sup>13</sup> See *AT&T Petition* at 18-19; 47 C.F.R. § 69.5(b).

calculation of its universal service fund obligations,<sup>14</sup> which apply to “interstate telecommunications services.”<sup>15</sup> By its own admissions and actions, therefore, AT&T has acknowledged that its IP-in-the-middle long distance service is an interstate telecommunications service that uses local switching facilities. As such, the plain language of Rule 69.5(b) compels AT&T to pay access charges.

**(2) The 1998 Report to Congress Did Not – and Could Not – Create an Exemption from the Commission’s Access Charge Rules.**

Unable to dispute that its IP-in-the-middle long distance service is a telecommunications service that uses local switching facilities, AT&T claims that the Commission’s 1998 *Report to Congress* created a specific exemption from the Commission’s access charges rules for all voice services that use IP in any form.<sup>16</sup> This claim mischaracterizes the text of the *Report to Congress*, which by its terms did not alter the access charge rules in any way; misinterprets the Commission’s intent, which was not to change the access charges rules; and misapprehends the law, which prohibits the Commission from altering the access charge rules without adhering to well-established procedural requirements.

**(a) The Text of the Report to Congress Did Not Alter the Commission’s Access Charge Rules.**

AT&T argues that the *Report to Congress* created a temporary new exemption to Rule 69.5 for all voice services that use IP.<sup>17</sup> In support of this argument, AT&T relies entirely on one sentence in Paragraph 91 of the *Report*, which states: “We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are ‘telecommunications services,’ and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges.”

This one sentence, even by itself, does not signify that access charges do not now apply to phone-to-phone IP telephony, much less create a new exemption for such traffic from the access charge rules.<sup>18</sup> But when this sentence is read in context, and, in particular, in the context of paragraphs 90 and 91, that becomes even clearer.

In paragraph 90 of the *Report*, the Commission explains why it decided not to conclude categorically that phone-to-phone telephony is a telecommunications service. It explains, in

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<sup>14</sup> See *AT&T Petition* at 41 (“AT&T has paid USF contributions on those phone-to-phone IP services that arguably meet the telecommunications service definition.”).

<sup>15</sup> See 47 U.S.C § 254(d).

<sup>16</sup> See, e.g., *AT&T Reply Comments* at 7. Ironically, AT&T vehemently opposed any such exemption in its comments to the Commission in the proceeding on the *Report to Congress*. See *Report to Congress* ¶ 83 n.171 (citing AT&T Comments at 12-13).

<sup>17</sup> See *AT&T Reply Comments* at 10-12.

<sup>18</sup> Even when read by itself, the sentence only speaks to what the Commission might find reasonable in a future rulemaking; it says nothing about the rules that apply in the interim.

essence, that future technological changes may blur the distinction between a phone and a computer, thereby rendering unsustainable the distinction between phone-to-phone IP telephony and other forms of IP telephony:

Because of the wide range of services that can be provided using packetized voice and innovative CPE, we will need, before making definitive pronouncements, to consider whether our tentative definition of phone-to-phone IP telephony accurately distinguishes between phone-to-phone and other forms of IP telephony, and is not likely to be quickly overcome by changes in technology. We defer a more definitive resolution of these issues pending the development of a more fully-developed record because we recognize the need, when dealing with emerging services and technologies in environments as dynamic as today's Internet and telecommunications markets, to have as complete information and input as possible.

Having thus deferred to future proceedings a definitive determination of the regulatory status of certain forms of phone-to-phone IP telephony, the Commission went on, in paragraph 91, to describe other issues it might confront in such proceedings. Of particular significance, it discussed how it might address the application of access charges in such proceedings. It noted that "we may find it reasonable that [certain forms of phone-to-phone IP telephony] pay access charges, but it also observed that it "may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate." Hence, the Commission again hedged its bets and concluded paragraph 91 by reiterating, "[w]e intend to examine these issues more closely based on the more complete records developed in future proceedings."<sup>19</sup>

There is nothing in this paragraph that suggests the Commission was doing anything other than identifying issues it might confront in future proceedings. In fact, the Commission specifically notes in paragraph 91 that "[t]he Act and the Commission's rules impose various requirements on providers of telecommunications, including ... paying interstate access charges[.]" The Commission never says in paragraph 91 -- or anywhere else in the *Report* for

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<sup>19</sup> The full text of paragraph 91 is as follows:

In upcoming proceedings with more focused records, we undoubtedly will be addressing the regulatory status of various specific forms of IP telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are "telecommunications carriers." The Act and the Commission's rules impose various requirements on providers of telecommunications, including contributing to universal service mechanisms, paying interstate access charges, and filing interstate tariffs. We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges. On the other hand, we likely will face difficult and contested issues relating to the assessment of access charges on these providers. For example, it may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate, and thus subject to the federal access charge scheme, or intrastate. We intend to examine these issues more closely based on the more complete records developed in future proceedings.

*Report to Congress* ¶ 91.

that matter -- that it is creating an exemption from that requirement on an interim basis or otherwise. To the contrary, the Commission makes clear that it is not deciding or changing *anything* -- at least, not yet.<sup>20</sup> It even notes in the very next paragraph that it would “need to carefully consider” whether to forbear from imposing rules that would treat phone-to-phone IP telephony services providers as telecommunications carriers. AT&T’s claim that the *Report to Congress* created an access charge exemption is thus woefully off-base.<sup>21</sup>

There also is no serious argument that the *Report to Congress* held that phone-to-phone IP telephony services should temporarily be treated as information services and, in effect, be granted immunity from Rule 69.5.<sup>22</sup> Nowhere does the *Report to Congress* even purport to take such an approach.<sup>23</sup> To the contrary, the only conclusion it reached with respect to the classification of such services was that they “lack[] the characteristics that would render them ‘information services’ within the meaning of the statute, and instead bear the characteristics of ‘telecommunications services.’”<sup>24</sup>

Indeed, AT&T has not only conceded on numerous occasions that IP-in-the-middle long distance service is a telecommunications service, but it also has continued to pay *originating* access charges for its IP-in-the-middle long distance service.<sup>25</sup> This belies any argument that AT&T is lawfully exempt from such charges on the terminating end. If AT&T genuinely

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<sup>20</sup> The fact that the Commission speaks in the future tense when discussing the application of access charges to phone-to-phone IP telephony (“we may find it reasonable” that providers of phone-to-phone IP telephony pay similar access charges) is not, as AT&T claims, evidence that access charges do not now apply; it simply reflects the fact that the Commission is referring to what it might decide in a *future proceeding*.

<sup>21</sup> At the risk of beating a dead horse, SBC further notes that, whatever the meaning of Paragraph 91 with respect to services that fall within the term “phone-to-phone IP telephony” as the Commission tentatively defined it, it is inapplicable to the provision of IP-in-the-middle long distance service, which is something entirely different. The “phone-to-phone IP telephony” services discussed by the Commission involve either the use of specialized “software and hardware at the customer premises,” or require the end user to “dial[] the phone number of a *local* gateway,” which provides a “second dialtone” and prompts the user to “dial[] the phone number of the party he or she wishes to call.” *Id.* ¶ 84. The provision of long distance service using IP-in-the-middle involves neither. Rather, customers use their ordinary phones, and simply dial the phone number of the called party, just as they would for any other long distance call. There is no intermediary gateway or computer with which consumers interact directly. Thus, whatever the Commission intended to accomplish in the *Report to Congress*, it cannot be read to apply to long distance services using IP-in-the-middle, which the *Report* did not even consider.

<sup>22</sup> See, e.g., *ITAA Reply Comments* at 4; *AT&T Reply Comments* at 7.

<sup>23</sup> Nor, contrary to AT&T’s claim, did the Commission indicate it had taken such an approach in the *Intercarrier Compensation NPRM*. See AT&T 12/23/03 Ex Parte at 1. The Commission stated there that “long-distance calls handled by ISPs using IP telephony are generally exempt from access charges.” *Developing a Unified Inter-carrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 ¶ 6 (2001) (emphasis added). It did not indicate that long distance calls that are handled by interexchange carriers, and that are classified as telecommunications services, are exempt from access charges.

<sup>24</sup> *Report to Congress* ¶ 89.

<sup>25</sup> See *AT&T Petition* at 18-19 (“calls are routed over Feature Group D access lines with customers . . . dialing one plus the called number, so originating access charges are paid on these calls.”); see also Tom Becker, *AT&T Expects VOIP Move to Result in Considerable Savings*, Dow Jones Business News, Dec. 11, 2003 (quoting AT&T spokesman Bob Nersesian: “We are not arguing that the Bells should never be paid for a telephone call again,” rather, “[i]f you make a voip call from your house to a traditional phone at your mother’s house, the Bells should be paid for terminating the call at your mom’s house. We expect to pay those fees.”).

believed that it was exempt from access charges based on the text of the *Report to Congress*, it is incredulous to think that it would continue paying them, as it admits it is doing. Rather, AT&T would be expected to seek out a legitimate alternative, such as requesting a different form of access to the network. Of course, any such request would have revealed AT&T's attempt to skirt the law – something that AT&T and other carriers have been able to accomplish on the terminating end by using methods of termination that disguise the true nature of their traffic.<sup>26</sup> The Commission must immediately put an end to this unlawful practice.

**(b) The Commission Did Not Intend to Alter its Access Charge Rules in the *Report to Congress*.**

While AT&T is thus flat-out wrong in arguing that paragraph 91 of the *Report* created a new access charge exemption, the nature of the *Report* and the context in which it was issued further confirm that the Commission did not intend in that *Report* to create any such exemption. The *Report to Congress* was neither a rulemaking nor a proceeding to consider forbearance, and accordingly it *could not* have been used as the vehicle to effect a change in the Commission's access charge regime. The Administrative Procedure Act requires the Commission to make "substantive changes in prior regulations" through notice and comment rulemaking.<sup>27</sup> And as the Commission itself has found, that mandate applies with particular force where, as here, the rules at issue apply to "an entire class of companies" and have industry-wide effect.<sup>28</sup> Of course, the Commission is well aware of these requirements, and had it intended to alter its access charge rules through the creation of a significant new exemption, it would have chosen the proper vehicle for affecting that change.

The Commission also would have given proper notice of its intended change and properly published that change after adoption. It is black letter administrative law that the Commission must provide adequate notice before changing its rules and must properly publish those rules once adopted. In preparing the *Report to Congress*, the Common Carrier Bureau (not the Commission) issued a Public Notice (not a notice of proposed rulemaking) seeking comment.<sup>29</sup> That Public Notice, however, sought comment only on the universal service issues

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<sup>26</sup> See Reply Comments of SBC Communications, Inc., WC Docket No. 02-361 at 9-10 (Jan. 24, 2003) ("*SBC Reply Comments*").

<sup>27</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003); see *id.* at 373 ("In contrast to an informal adjudication or a mere policy statement, which 'lacks the firmness of a [prescribed] standard,' an agency's imposition of requirements that 'affect subsequent [agency] acts' and have a 'future effect' on a party before the agency triggers the APA notice requirement.") (citing *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 95-96 (D.C. Cir. 2002)); 5 U.S.C. §553; *Amendment of the Commission's Rules Regarding Broadcast Station Identification Announcements*, Memorandum Opinion and Order, 58 F.C.C. 2d 335, ¶ 7 (1976) ("Ordinarily, prior notice of proposed rulemaking is required before a change in our substantive rules can be adopted."); *USF Data Collection Order*, 11 FCC Rcd at 13918, ¶ 10 ("[s]ubstantive modifications . . . require a rulemaking").

<sup>28</sup> See, e.g., *GVNW Inc./Management and Citizens Utilities Company Applications for Review*, Memorandum Opinion and Order, 14 FCC Rcd 13670, 13675, ¶ 8 (1999) ("substantive modifications to the Commission's rules for an entire class of companies . . . require a rulemaking proceeding."); *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, ¶ 23 (2000) ("[D]isputes on issues of general application [] are more appropriately the subjects of industry-wide notice-and-comment rulemaking.").

<sup>29</sup> See Public Notice, CC Docket No. 96-45, DA 98-2 (Jan. 5, 1998).

associated with implementing the 1996 Act. Nowhere did it even mention access charges or Rule 69.5, let alone provide notice that the Commission itself was considering amending those rules.<sup>30</sup> The Commission also did not publish the *Report to Congress* in the Federal Register after adoption.<sup>31</sup> Here again, even assuming *arguendo* that the Commission could change its access charge rules in a *Report to Congress*, the Commission was well aware that any such change would have to be properly noticed and published. The absence of any such notice or publication is further evidence that the Commission intended no such change.

Other procedural aspects of the *Report to Congress* likewise confirm that the Commission did not intend to modify its access charge rules or their application in any way. Specifically, the *Report* does not contain any ordering clauses or an appendix of amended rule sections. Given the Commission's uniform practice of including both of these items in its rulemakings, the failure to do so here is compelling evidence that the Commission did not intend to alter its rules.

**(c) As a Matter of Law, the Commission Could Not Have Altered Its Access Charge Rules in the *Report to Congress*.**

Even if the Commission had intended to alter its access charge rules in the *Report to Congress* -- which it did not -- and even if the text of the *Report to Congress* could be read to modify those rules -- which it cannot -- the Commission could not have altered those rules as a matter of law. The APA requires that, when an agency adopts or changes a rule, notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved" must be published in the Federal Register.<sup>32</sup> As the D.C. Circuit has made clear in an analogous situation, any attempt to alter the Commission's access charge rules absent proper notice is unlawful, because the parties cannot "reasonably assume that the Commission would . . . undertake, as a result of the Bureau's Notice, consideration of more than" it proposed in that Notice.<sup>33</sup> Thus, in light of this procedural infirmity, it would be reversible error for the Commission to determine that the *Report to Congress* modified its access charge rules in any way.

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<sup>30</sup> Although the Commission's rules do not require it to provide notice before issuing "interpretative rules" or "general statements of policy," 47 C.F.R. § 1.412(b)(3),(4), "[i]t is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation," *Appalachian Power Company v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (citing *Paralyzed Veterans v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997); *American Mining Congress v. MSHA*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993)).

<sup>31</sup> See *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) ("Failure to publish in the Federal Register is [an] indication that the statement in question was *not* meant to be a regulation . . .") (citation omitted).

<sup>32</sup> 5 U.S.C. § 553(b).

<sup>33</sup> *Sprint*, 315 F.3d at 376 (Holding that where the Common Carrier Bureau issued a public notice seeking comment on a petition for clarification of one of the Commission's rules, this was not sufficient notice "that the Commission was proposing to 'revise' its initial rule, much less that it would" adopt a policy "in any manner other than" the one suggested in the petition.).

In addition, the APA and the Commission's own rules also mandate that any rule modifications be published in the Federal Register after they are adopted.<sup>34</sup> The *Report to Congress*, however, was never published in the Federal Register. Again, any attempt by the Commission to enforce the *Report to Congress's* purported modification to Rule 69.5 would be a clear violation of the APA and its own rules and would constitute reversible error.<sup>35</sup> Of course, AT&T is aware of these requirements as well. Thus its claim that the *Report* effected major substantive changes in the Commission's rules rings hollow.

**(3) As a Matter of Law, the Obligation To Pay Access Charges for IP-in-the-Middle Long Distance Service Applies Both Prospectively and Retroactively.**

Some parties have claimed that, even if the Commission denies AT&T's petition and declares that IP-in-the-middle services are subject to access charges, it should affirmatively limit the retroactive effect of that holding by exempting carriers from paying the access charges they incurred in the time since the *Report to Congress* was released.<sup>36</sup> Any such approach would be unlawful and grossly inequitable. Putting the most charitable gloss on this matter, AT&T (and others) misread the Commission's rules. Those rules clearly require access charges to be paid on "IP-in-the-middle" traffic; AT&T and others assumed otherwise and they were wrong. Even under that charitable version of events, there would be no legal or policy basis upon which the Commission could reward these carriers with a prospective-only decision.

But this charitable version of events does not, in fact, tell the whole story. AT&T and others actively avoided paying access charges through a scheme designed to evade detection, thus calling into doubt whether they were acting on a good faith reading of the law.<sup>37</sup> It is therefore highly disingenuous for AT&T to claim that it avoided paying access charges "for years, without complaint from SBC," when AT&T hid the true nature of its terminating traffic from SBC.<sup>38</sup> Had AT&T fully and forthrightly disclosed to SBC that it was terminating interstate telecommunications traffic over SBC's local switching facilities without paying SBC's lawfully tariffed switched access rates, SBC would have strongly objected to AT&T's actions from the outset. Indeed, it was only *after* SBC and other LECs began unraveling AT&T's access avoidance scheme that AT&T filed its petition with the Commission.<sup>39</sup> Moreover, rather than waiting for a decision from the Commission on that petition, AT&T and others have accelerated their access avoidance after the petition was filed.<sup>40</sup> A decision that is purely prospective would

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<sup>34</sup> See 5 U.S.C. § 553(d); 47 C.F.R. § 1.427. See also 5 U.S.C. § 552(a)(1)(D) (requiring publication in the Federal Register of all "interpretations of general applicability.").

<sup>35</sup> AT&T also suggests that the *Report to Congress* waived Rule 69.5. See *AT&T Reply Comments* at 10-11. This suggestion is pure fantasy. The Commission never invoked Rule 1.3, never mentioned the term "waiver," and, more importantly, never made the requisite finding of good cause to support a waiver. See 47 C.F.R. § 1.3 (the Commission may waive its rules upon a showing of good cause).

<sup>36</sup> See, e.g., AT&T 12/22/03 Ex Parte at 2-5; Time Warner Telecom 11/25/03 Ex Parte at 4; CNM 12/1/03 Ex Parte at 2.

<sup>37</sup> See *SBC Reply Comments* at 9-10.

<sup>38</sup> AT&T 12/22/03 Ex Parte at 2.

<sup>39</sup> See *AT&T Petition* at 1, 4-5, 19-20.

<sup>40</sup> See *infra* nn. 95, 96.

not only reward AT&T for misreading the law and camouflaging the nature of its termination practices, but would do so at the expense of those LECs who have continued to terminate AT&T's long-distance traffic in the good faith belief that ultimately they would be paid the proper, tariffed terminating access charge for the service they were providing. For the Commission to reward such audacious behavior -- particularly when doing so necessarily comes at the expense of carriers that played by the rules -- would be a gross miscarriage of justice.

Equally important, any Commission decision to apply access charges on a prospective-only basis would be blatantly unlawful. As discussed below, the D.C. Circuit and this Commission have repeatedly held that there is a strong presumption of retroactivity even when an agency applies existing law to a new set of facts. The only way to overcome this presumption is to demonstrate a "manifest injustice" that results from "reasonable" and "detrimental" reliance.

Here, it is not clear that there are any material "new facts" that would trigger the "manifest injustice" inquiry. The fact that AT&T is using IP technology to transport long-distance traffic is new, but not in any way that is relevant to the application of the rules. As noted above, regardless of AT&T's transport medium, such traffic is clearly a telecommunications service that uses LEC switches and thus falls under Rule 69.5.

But, as shown below, even assuming, *arguendo*, that this case does involve an application of existing law to a new set of facts, AT&T cannot possibly show the manifest injustice that is necessary to rebut the presumption of retroactivity. Indeed, the only parties who could theoretically experience manifest injustice here would be the LECs, if the Commission unlawfully decided to eliminate the obligations of AT&T and other carriers to pay past-due access charges.

**(a) Judicial and Commission precedent dictate that where an agency applies an existing rule to new facts, there is a strong presumption that the determination has both prospective and retroactive effect.**

In addressing the question of retroactivity in agency adjudications, the D.C. Circuit distinguishes between two types of cases: (1) applications of existing law to new facts or other clarifications of existing law; and (2) substitutions of new law for old law that was reasonably clear.<sup>41</sup> The court has held that applying a determination retroactively "in the former case is 'natural, normal, and necessary.'"<sup>42</sup> In such cases "the courts start with a presumption in favor of retroactivity."<sup>43</sup> And the Commission itself follows this same approach.<sup>44</sup>

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<sup>41</sup> *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993) (citing *Aliceville Hydro Assocs. V. FERC*, 800 F.2 1147, 1152 (D.C. Cir. 1986)); see also *Public Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996) (applying this distinction).

<sup>42</sup> *Williams*, 3 F.3d at 1554 (emphasis added) (citing *Aliceville*, 800 F.2d at 1152).

<sup>43</sup> *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (citing *Health Ins. Ass'n of Am. V. Shalala*, 23 F.3d 412, 424 (D.C. Cir.1994)); see also *Exxon Co., USA v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1999) ("There is also a strong equitable presumption in favor of retroactivity that would make the parties whole.").

<sup>44</sup> See, e.g., *Communications Vending Corp. of Arizona Inc. v. Citizens Communications Co.*, Memorandum Opinion and Order, 17 FCC Rcd. 24201, ¶ 33 (2002) ("where the case involves 'new applications of existing law,

Under these well-established precedents, any clarification by the Commission of its existing access charge rules or any application of those rules in the context of a new service would trigger the presumption of retroactivity. As demonstrated above, the *Report to Congress* did not – and lawfully could not – alter Rule 69.5 requiring interexchange carriers to pay access charges for telecommunications services. Nor did the *Report to Congress* create a new exemption to that rule for telecommunications services provided using IP in any form, or declare that all such services would effectively be treated as information services until further notice. Rather, the *Report to Congress* expressly declined to make any “definitive pronouncements” on these issues, preferring to wait for “a more complete record focused on individual service offerings.”<sup>45</sup> Accordingly, any Commission action in response to AT&T’s current petition would constitute an application of *existing* law – namely, applying the existing access charge rules to the facts presented in AT&T’s petition regarding its IP-in-the-middle long distance service.

In an effort to side-step the controlling precedent in this case, AT&T and other parties have mistakenly claimed that the Commission should base its retroactivity analysis on the decision of the Supreme Court in *SEC v. Chenery* and its progeny.<sup>46</sup> The *Chenery* line of cases, however, dealt with situations where an agency applied a *new* rule or policy, not an existing rule to new facts.<sup>47</sup> Thus, these cases are wholly inapplicable to AT&T’s petition. Moreover, even if *Chenery* and its progeny were applicable -- and they are not -- this line of cases merely requires an agency to balance retroactivity “against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.”<sup>48</sup> As mentioned above, allowing AT&T and others to avoid their lawful access charge obligations would produce a result that is grossly inequitable to LECs who provided access services to AT&T in good faith and who deserve to be appropriately compensated for their services. It also would be unfair to those IXC’s that did not flout the Commission’s access charge rules, and it would be inconsistent with the principle of nondiscrimination that is codified in section 202 of the Act. Equally important, it would send a message that, when it comes to this Commission, it pays to flout the rules if you are not an ILEC. It is hard to see how *that* result is consistent with the statutory design or legal and equitable principles.

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clarifications, and additions,’ the court starts with a presumption in favor of retroactivity.”) (citing *Verizon*, 269 F.3d at 1109).

<sup>45</sup> *Report to Congress* ¶ 90.

<sup>46</sup> *SEC v. Chenery*, 332 U.S. 194 (1947). See also *Time Warner Telecom* 11/25/03 Ex Parte (citing *Chenery*; *Retail Wholesale & Dep’t Stores Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972).

<sup>47</sup> See *Retail Wholesale* at 389-90 (“In deciding whether to grant or deny retroactive force to *newly adopted administrative rules*, reviewing courts must look to the standard established by the Supreme Court in *SEC v. Chenery* . . . .”) (emphasis added).

<sup>48</sup> *SEC v. Chenery*, 332 U.S. at 203.

**(b) Although the presumption of retroactivity may be rebutted by a showing of “manifest injustice,” AT&T has failed to make such a showing here.**

In order to overcome the strong presumption of retroactivity, a party must demonstrate that retroactivity would work a “manifest injustice.”<sup>49</sup> To determine whether manifest injustice would occur, courts have focused on two key factors: (1) whether the party detrimentally relied on an agency decision, and (2) whether such reliance was reasonable.<sup>50</sup> As discussed below, AT&T has failed to provide any evidence that it detrimentally relied on its erroneous interpretation of the *Report to Congress*. Moreover, even if AT&T were able to show detrimental reliance, that reliance would not be reasonable as a matter of law.

**(i) AT&T did not detrimentally rely on the *Report to Congress*.**

Beyond the bare assertions of its lawyers, AT&T has not provided a shred of proof that it detrimentally relied on the *Report to Congress* in deciding to provide IP-in-the-middle long distance service.<sup>51</sup> Nor has it “even roughly quantified the harm . . . that [it] might suffer should [it] have to refund the full amount that [it has] unlawfully,” avoided.<sup>52</sup> In fact, AT&T’s own public statements belie any possible claim of detrimental reliance. In a recent press release, AT&T said that its strategy for IP services “is driven by one simple principle – customer convenience and control over their communications.”<sup>53</sup> In the same release, AT&T’s Chief Executive Officer said VoIP was significant because it “leverag[es] the efficiencies and advanced communications capabilities of IP-based technology.” The company’s Chief Technical Officer also has acknowledged that “infrastructure capital savings” are driving AT&T’s build-out of this new technology.<sup>54</sup> Other carriers have likewise indicated that their

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<sup>49</sup> *Verizon*, 269 F.3d at 1109 (citing *Clark-Cowlitz*, 826 F.2d at 1081). See also *Thorpe v. Housing Auth. Of the City of Durham*, 393 U.S. 268 (1969); *Consol. Freightways v. NLRB*, 892 F.2d 1052, 1058 (D.C. Cir. 1989); *Allegheny Ludlum Corp. v. NLRB*, 301 F.3d 167, 180 (3<sup>rd</sup> Cir. 2002) (“We must defer to agency retroactivity rulings unless the ruling creates ‘manifest injustice.’”).

<sup>50</sup> See *Garvey v. NTSB*, 190 F.3d 571, 584-85 (D.C. Cir. 1999) (the issue of manifest injustice “boils down to the question of whether the regulated party reasonably and detrimentally relied on a previously established rule.”). See also *Clark-Cowlitz*, 826 F.2d at 1081 (providing a non-exhaustive list of five factors to assist courts with the manifest injustice analysis); *Verizon*, 269 F.3d at 1110-11 (recognizing that courts need not address all five factors of *Clark-Cowlitz*; addressing lack of reasonable reliance); *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (“no need to plow laboriously through the *Clark-Cowlitz* factors;” focusing on lack of reasonable reliance); *Public Serv. Co. of Colorado v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) (determining that reliance was neither detrimental nor reasonable).

<sup>51</sup> See, e.g., *AT&T Petition* at 18; AT&T 12/23/03 Ex Parte at 2.

<sup>52</sup> *Public Serv. Co.*, 91 F.3d at 1490.

<sup>53</sup> *AT&T Unveils Major Voice over Internet Initiative: Will Expand Business and Launch Consumer Offers in 2004*, AT&T News Release, Dec. 11, 2003.

<sup>54</sup> H. Eslambolchi, AT&T CTO & CIO & President AT&T Labs, *Services over IP Network Evolution* at 4, attached to November 5, 2003 Ex Parte in CC Docket Nos. 01-92 et al (“*Eslambolchi Presentation*”); see also Q2 2003 *AT&T Earnings Conference Call – Final*, Transcript 072403ag.742, FD (Fair Disclosure) Wire (July 24, 2003) (“We [] recognize that we can’t deliver the network of the future without investing today. . . . We’re applying our expertise to consolidate AT&T’s legacy networks into a single, global IP network.”).

decision to implement IP technology is motivated by operational savings, efficiencies, and the ability to provide new services.<sup>55</sup>

Even if AT&T had detrimentally relied on its erroneous ostensible interpretation of the *Report*, any detrimental effect it may experience if required to pay past-due access charges is far outweighed by the inequities the LECs would suffer if the Commission denied them such payments. D.C. Circuit precedent makes clear that the equitable interests of the LECs in this case are just as relevant as those of AT&T and the other parties claiming they relied on the *Report to Congress*.<sup>56</sup> Thus, the court has required the Commission to give a decision retroactive effect where it is necessary to “make the parties whole.”<sup>57</sup> As the court explained, “[a]bsent detrimental and reasonable reliance, anything short of full retroactivity . . . allows [some parties] to keep some unlawful [benefit] without any justification at all.”<sup>58</sup>

Applying these standards here, the Commission may not limit the retroactive effect of its ruling on AT&T’s petition. Doing so would confer an unlawful benefit to AT&T and other carriers that have avoided paying access charges, and would fail to make the ILECs whole for the services they have provided.<sup>59</sup>

**(ii) Any purported reliance by AT&T on the *Report to Congress* was unreasonable as a matter of law.**

Even if AT&T had detrimentally relied on its erroneous understanding of the *Report to Congress*, such reliance was, as a matter of law, unreasonable.<sup>60</sup> In *Verizon*, *Exxon*, and *Public Serv. Co.*, the D.C. Circuit held that parties may not assert a claim of reasonable reliance either in

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<sup>55</sup> See, e.g., MCI Press Release, *MCI Joins with Nortel Networks to Accelerate Convergence of Voice and Data Networks on Common IP Core* (June 3, 2003) (Fred Briggs, MCI President of Operations and Technology: “[w]ith this implementation [of ubiquitous IP], we will increase network efficiency and realize operational savings while providing additional value to our customers.”); F. Governali, et al., Goldman Sachs Equity Research, *Telecom Services, VoIP* at 8 (July 7, 2003) (MCI “cited cost savings, network efficiencies, and the ability to offer enhanced services to its customers as the motivation behind the transition to VoIP.”).

<sup>56</sup> See, e.g., *Cassell*, 154 F.3d at 487 (incumbent licensees would face greater burdens than petitioners if Commission denied retroactive application of newly announced benchmark).

<sup>57</sup> *Exxon*, 182 F.3d at 49.

<sup>58</sup> *Public Service Co.*, 91 F.3d at 1490.

<sup>59</sup> See, e.g., *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶ 732 (2002) (“[W]e grant Verizon’s request for a provision giving it the right to terminate or suspend service when a competitive LEC withholds payments for service of facilities without a *bona fide* reason, or otherwise materially breaches the agreement.”).

<sup>60</sup> The case *Time Warner Telecom* cites as providing the “leading test” for whether an agency rule should be applied retroactively – *Retail, Wholesale & Dep’t Store Union v. NLRB* – confirms this. In that case, the D.C. Circuit held that it was inappropriate to apply an agency ruling retroactively to a party that was relying on a “well established and long accepted” agency policy in conflict with that ruling. *Retail, Wholesale & Dep’t Store Union v. NLRB*, 466 F.2d 380, 391 (D.C. Cir. 1972). Even the most generous reading of the *Report to Congress* does not fit that description. Again, the *Report* explicitly states that it is not “mak[ing] any definitive pronouncements in the absence of a more complete record focused on individual service offerings.” *Report to Congress* ¶ 90.

situations where there are no clear agency rules in effect,<sup>61</sup> or in situations where the agency's policy was either "in dispute" or where the agency "warns all parties" that its policy is "only tentative and might be disallowed."<sup>62</sup> In each of those cases, the court held that the reliance that parties placed on such prior agency decisions was "unreasonable" and "unwarranted."<sup>63</sup> Under these circumstances, the court concluded that it is an "abuse of discretion" for the agency to determine that a subsequent change in policy should be applied only prospectively and not retroactively.<sup>64</sup>

The situation here presents a far *weaker* case for denying retroactive effect than the cases in which the D.C. Circuit found such an approach impermissible. In *Verizon*, for example, the Commission gave retroactive effect to a *change* in its interpretation of its own rules. Indeed, the LECs in that case had relied on a series of decisions from the Commission and its staff. Here, at most, AT&T would be relying on its own misreading of the *Report to Congress*. If it is not reasonable for LECs to rely on a clear holding repeated in a series of decisions, how can it be reasonable for AT&T to rely on its own misreading of a report to Congress, particularly a misreading that has all the indicia of a deliberate and knowing evasion of the law. Moreover, the *Report to Congress* expressly noted that its decisions were only "tentative," and that it may alter those decisions in the future.<sup>65</sup> Indeed, the claim by AT&T and others that the *Report to Congress* adopted a "wait-and-see" approach unwittingly concedes that these parties have no legitimate basis to assert reasonable reliance on that decision. Even under AT&T's own characterization, therefore, the *Report to Congress* provides much weaker grounds for parties to claim reliance than the agency decisions at issue in *Verizon*.<sup>66</sup>

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<sup>61</sup> See *Verizon*, 269 F.3d at 1110 (holding that "no claim of reliance can possibly be maintained" when parties act in the absence of agency rules on a subject, and that instead parties are "entirely at their own risk").

<sup>62</sup> *Public Service Co.*, 91 F.3d at 1490; *Exxon*, 182 F.3d at 49.

<sup>63</sup> See, e.g., *Verizon*, 269 F.3d at 1111 (reliance on an agency decision is "not reasonable" where that decision was neither settled nor well-established); *Exxon*, 182 F.3d at 49 (reliance on agency decision "was unwarranted" where the agency "warns all parties involved" that a policy "is only tentative and might be disallowed"); *Public Service Co.*, 91 F.3d at 1490 (any detrimental reliance on agency decision "would not have been reasonable" where decision was "in dispute").

<sup>64</sup> See, e.g., *Exxon*, 182 F.3d at 49 (holding that agency "abused [its] discretion" in denying retroactive to agency decision that changed prior "tentative" agency determination on which parties had no legitimate basis to rely); *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1083 n.7 (D.C. Cir. 1987) ("[A] holding of nonretroactivity . . . cannot be premised on a *single*, recent agency decision . . . that is still in the throes of litigation when it is overruled."); *Public Service Co.*, 91 F.3d at 1490 (agency denial of retroactivity is improper where there was no showing of detrimental and reasonable reliance).

<sup>65</sup> See *Report to Congress* ¶¶ 90-91.

<sup>66</sup> AT&T attempts to distinguish *Verizon* by arguing that the court based its holding of unreasonable reliance on the fact that the Commission decision at issue was under constant legal review, whereas the *Report to Congress* was never appealed. AT&T 12/22/03 Ex Parte at 3-4. This overly-narrow reading of *Verizon*'s reliance analysis is unfounded. In reality, the court determined the parties' reliance to be unreasonable because the Commission's end-user fee decision "was neither settled . . . nor 'well-established,'" as demonstrated by the fact that the decision was subject to constant legal review. *Verizon* at 1110. The *Report to Congress*, which did not make "any definitive pronouncements," also did not produce a settled or well-established Commission decision on IP telephony and would therefore similarly fail to provide a basis for reasonable reliance under *Verizon*.

Further undermining the reasonableness of any reliance by AT&T is US West's 1999 petition asking the Commission to clarify that access charges must be paid on "phone-to-phone IP telephony." AT&T itself states that US West's petition "clearly presented an 'actual controversy.'" <sup>67</sup> AT&T also has noted ongoing "controversies" in the states on this issue. <sup>68</sup> And, of course, AT&T's own decision to petition for a declaratory ruling is, by definition, a recognition of the need to "terminat[e] a controversy" on this issue. <sup>69</sup> In light of all this, the Commission may not lawfully determine that parties have relied reasonably on the *Report to Congress* in deciding not to pay access charges.

Moreover, retroactivity is appropriate in this case even if the Commission determines – contrary to fact – that denying AT&T's petition would change some clear policy adopted in the *Report to Congress*. In that scenario, the Commission would merely be correcting a prior legal mistake – namely, the determination that access charges do not apply to AT&T's IP-in-the-middle long distance service. The D.C. Circuit has repeatedly held that retroactivity is appropriate in such circumstances. <sup>70</sup> To conclude otherwise would deny the ILECs charges to which they are lawfully entitled "merely because the FCC bungled their case the first time around." <sup>71</sup> Thus, "when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made." <sup>72</sup>

Despite all this, Time Warner Telecom has claimed that "where an agency's established policy or rule is deemed to be ambiguous . . . there is a strong interest in avoiding retroactive application of a new policy that is inconsistent with the regulated companies' prior interpretation." <sup>73</sup> All of the cases cited by Time Warner Telecom in support of this proposition, however, are entirely inapposite. Each case involved an agency announcing a *new* rule or policy. <sup>74</sup> By contrast, a Commission decision in the instant matter would be the application of an

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<sup>67</sup> *AT&T Reply Comments* at 14; *see also AT&T Petition* at 15-17.

<sup>68</sup> *AT&T Petition* at 21-22; *see also AT&T Reply Comments* at 41 (AT&T has continued to pay USF contributions on its IP-in-the-middle long distance "out of an abundance of caution," thereby recognizing the ongoing dispute on this issue).

<sup>69</sup> 47 C.F.R. §1.2.

<sup>70</sup> *See, e.g., Verizon*, 269 F.2d at 1111; *Exxon*, 182 F.3d at 49.

<sup>71</sup> *Verizon*, 269 F.2d at 1111.

<sup>72</sup> *Exxon*, 182 F.3d at 49 (citing *Public Utils. Comm'n of the State of California v. FERC*, 998 F.2d 154, 168 (D.C. Cir. 1993)).

<sup>73</sup> Time Warner Telecom 11/25/03 Ex Parte at 5.

<sup>74</sup> *See Retail Wholesale*, 466 F.2d at 391 (agency replaced "explicit standard of conduct" with a "new standard subsequently adopted"); *Standard Oil v. DOE* 596 F.2d 1029, 1037 (Temp. Emer. Ct. App. 1979) ("The NPCI Last rule was a 'new' rule" and was adopted "without prior notice or opportunity to comment"); *McDonald v. Watt*, 653 F.2d 1035, 1045 (5<sup>th</sup> Cir. 1981) ("[W]hile the IBLA's decision . . . did not technically overrule any 'official decision,' it was unquestionably 'an abrupt departure from [a] well established practice' of the agency."); *J.L. Foti Constr. Co. v. Occupational Safety and Health Review Comm'n*, 687 F.2d 853, 859 (6<sup>th</sup> Cir. 1982) (agency adopted new "different standards-similar hazards" rule; court also acknowledged that its "disposition of the retroactivity issue is, perhaps, outside the mainstream of published authority"); *NLRB v. Majestic Weaving*, 355 F.2d 854, 860 (2<sup>nd</sup> Cir. 1966) (agency changed policy of "conditional negotiation" that had been in place "for fifteen years"); *Microcomputer Technology Inst. v. Riley*, 139 F.3d 1044, 1049-51 (5<sup>th</sup> Cir. 1998) (agency substituted new policy for

*existing, clear and unambiguous* rule (Rule 69.5) to the facts raised in AT&T's petition. As discussed above, well-established precedent from the D.C. Circuit mandates retroactivity in these circumstances and an agency's failure to abide by that precedent constitutes reversible error.

**(c) Retroactivity also is required under the filed rate doctrine.**

SBC's interstate access tariffs provide the "regulations, rates and charges applying to the provision of access services" purchased by AT&T and other carriers.<sup>75</sup> Carriers wishing to obtain switched local access service from SBC must do so at the rates and terms posted in the tariff. AT&T and other carriers that provide IP-in-the-middle long distance service unquestionably use SBC's switched access service, and are therefore obligated to pay the tariffed rates for such service. Any attempt by the Commission to limit SBC's ability to collect these tariffed rates retroactively would violate the filed rate doctrine.

Both the Supreme Court and the D.C. Circuit have consistently held that an agency may not retroactively limit a carrier's ability to collect under a lawful tariff.<sup>76</sup> The filed rate doctrine thus prohibits an agency from retroactively lowering (or raising) a carrier's lawful tariffed rates.<sup>77</sup> Were it otherwise, parties "would be substantially and irreparably injured by [Commission] errors, and judicial review would be powerless to protect them from [many] of the losses so incurred."<sup>78</sup>

Moreover, the Supreme Court has held that the filed rate doctrine applies even where parties are not technically purchasing service out of the tariff. Thus, it is immaterial that AT&T has found ways to terminate traffic on SBC's network surreptitiously and without ordering access from SBC's tariff directly. In *Maislin Industries U.S. v. Primary Steel*, the Court held that the filed doctrine applied even where the parties had executed a private contractual arrangement and conducted business pursuant to that contract, rather than what should have been the governing tariff for many years.<sup>79</sup> Thus, the fact that AT&T is delivering its IP-in-the-middle long distance traffic to SBC over business lines or handing that traffic to CLECs who deliver it over interconnection trunks, does not change the fact that such traffic remains subject to SBC's tariffs.

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"long standing policy"); *Louisiana v. Dep't of Energy*, 507 F.Supp. 1365, 1376 (W.D. La. 1981) (agency adopted new definition of "property" that differed from prior definition).

<sup>75</sup> See, e.g., Pacific Bell Telephone Company, Tariff F.C.C. No. 1, Access Service, effective May 12, 2000; Ameritech Operating Companies, Tariff F.C.C. No. 2, Access Service, effective October 11, 1991.

<sup>76</sup> See, e.g., *ICC v. American Trucking Associations*, 467 U.S. 354, 361-364 (1984) (although an agency may reject tariffs at the time of filing and could cancel the prospective effect of tariffs, it lacked any general authority to retroactively invalidate tariffs that it had accepted for filing without objection); *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992); *Consolidated Edison v. FERC*, 958 F.2d 429, 434 (D.C. Cir. 1992); *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1139-42 (D.C. Cir. 1987).

<sup>77</sup> *Id.* See also *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Order on Reconsideration, 17 FCC Rcd 17040 (2002) (tariffs filed under streamlined tariff procedures, without suspension and investigation, are "deemed lawful" and retroactive damages may not be awarded). Although not the case here, if a streamlined tariff is not "deemed lawful," the bar against retroactive adjustments would not apply.

<sup>78</sup> *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-75 (D.C. Cir. 1992) (per curiam).

<sup>79</sup> 497 U.S. 116, 130-31 (1990). See also *AT&T v. Central Office Telephone*, 524 U.S. 214 (1998).

**(d) Any concerns about calculating and collecting the amount of retroactive liability can be addressed by the parties.**

AT&T and other parties have expressed concerns about the logistics of calculating and collecting past-due access charges.<sup>80</sup> Of course, these concerns fall well short of demonstrating the “manifest injustice” necessary to defeat the “strong equitable presumption in favor of retroactivity that would make the parties whole.”<sup>81</sup> Despite this, and in an attempt to mitigate these concerns, SBC commits to look to the IXC, not the intermediary CLECs, for any past-due access charges in all cases except where the CLEC knowingly participated in an access-avoidance scheme or unreasonably refused to cooperate with SBC’s attempts to identify and stop such a scheme, and received a benefit from doing so.

**(e) AT&T’s melodramatic claims about the Commission’s reputation are unfounded.**

AT&T expresses great concern for the harm that could befall “the Commission’s reputation” if it orders the retroactive payment of access charges.<sup>82</sup> According to AT&T, such a decision “would send the message that this is a Commission that cannot be trusted.”<sup>83</sup> While AT&T’s purported concern for the Commission’s reputation is admirable (though entirely self-serving), AT&T’s argument actually proves the opposite point. If an agency cannot be counted upon to enforce the unambiguous, well-established rules on its books, such as Rule 69.5, then that agency will be inviting parties to disregard those rules. Thus, far from harming the Commission’s reputation, an order requiring the retroactive payment of access charges will send a clear message that the Commission expects parties to fully comply with its rules, and will discourage parties from the “expenditure of funds on lawyers . . . [in] a gamble” on erroneous interpretations of Commission decisions.<sup>84</sup>

**(f) AT&T is not entitled to a retroactive waiver of the Commission’s access charge rules.**

Finally, unable to come to grips with what the law actually requires, AT&T falls back on the argument that the Commission should change the law, by granting a retroactive waiver of Rule 69.5.<sup>85</sup> The Commission may not do so, and AT&T does not provide even a scrap of support suggesting otherwise. AT&T cites *Wait Radio* for the proposition that the Commission

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<sup>80</sup> Time Warner Telecom claims that applying a retroactive bar on access charges is appropriate “since the burden on the industry of retroactive application of access charges would be enormous.” Time Warner Telecom 11/25/03 Ex Parte at 6; *see also* CNM 12/1/03 Ex Parte at 2. Although there are indeed costs involved in collecting access charges, this has always been the case, and has long been a part of the interconnection agreements between CLECs and ILECs. Requiring CLECs to conform to longstanding practices – even if they impose some added costs – hardly amounts to a “manifest injustice” to the CLECs.

<sup>81</sup> *Exxon*, 182 F.3d at 49.

<sup>82</sup> AT&T 12/22/03 Ex Parte at 2.

<sup>83</sup> *Id.*

<sup>84</sup> *Cassell*, 154 F.3d at 486.

<sup>85</sup> *Id.* at 2-3.

may grant waivers of its rules in “special circumstances.”<sup>86</sup> But that case involves a private party seeking an “*individualized*” waiver of an agency rule; it is inapplicable to cases concerning general industry-wide exemptions from a rule, which obviously raise much different questions of both administrative and substantive law. As the court stated, the rule permitting agencies to grant individualized waivers of its rules “does not contemplate that an agency must or should tolerate evisceration of a rule by waivers.”<sup>87</sup> Moreover, *Wait Radio* involved an applicant seeking a *prospective* waiver of the Commission’s rules; it is silent on the question whether an agency may give such waivers retroactive effect.

AT&T’s reliance on *Health & Medical Policy Research* fails for these same reasons.<sup>88</sup> Similarly, the two Commission decisions that AT&T cites for its claim that granting retroactive waivers is a “routine practice,” involve individual parties seeking waivers of rules in highly particularized situations.<sup>89</sup> They are irrelevant to the industry-wide exception AT&T is asking for here. Furthermore, in both of these decisions, the relief granted by the Commission did not impose significant financial burdens on other parties. By contrast, granting a blanket retroactive waiver here would allow AT&T and similarly situated providers to avoid hundreds of millions of dollars in access charges lawfully owed to SBC and other ILECs. There can be no showing of “good cause” that would justify such a grossly inequitable result.<sup>90</sup>

AT&T nonetheless claims that the Commission’s “remedial discretion” gives it the authority to grant a retroactive waiver of its rules.<sup>91</sup> AT&T confuses two very different concepts – the authority to impose penalties for a violation of the Commission’s rules, and the authority to deny retroactive effect to a determination that those rules have been violated. The cases AT&T cites involve only the former.<sup>92</sup> In this case, by contrast, the rule at issue by its own terms requires carriers to pay access charges, and any determination that AT&T and others violated that rule automatically requires carriers to make such payments. That is very different from the question whether, *in addition* to fulfilling their legal obligations under the rules, the Commission

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<sup>86</sup> *AT&T Reply Comments* at 11; AT&T 12/22/03 Ex Parte at 2.

<sup>87</sup> *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

<sup>88</sup> *Health & Medical Policy Research v. FCC*, 807 F.2d 1038 (D.C. Cir. 1986).

<sup>89</sup> AT&T 12/22/03 Ex Parte at 3 n.1; see *Rath Microtech Compliant Regarding Electronic Micro Systems*, 16 FCC Rcd 16710 (2001) (granting “limited waiver of labeling requirements and on-hook impedance limitations” to a single manufacturer of elevator emergency telephones); *Federal-State Joint Board on Universal Service; Petition of the Public Service Commission of the District of Columbia for Waiver*, 15 FCC Rcd 21996 (2000) (granting waiver requests of two public service commissions to permit distribution retroactive to January 1, 1998 of federal universal service support to certain telecommunications carriers that were not designated as eligible telecommunications carriers as of that date due to those commissions’ own delays in making a timely determination).

<sup>90</sup> See 47 C.F.R. § 1.3 (waiver of Commission rules must be based on a showing of good cause).

<sup>91</sup> AT&T 12/22/03 Ex Parte at 3.

<sup>92</sup> See *Connecticut Valley v. FERC*, 208 F.3d 1037, 1044 (agency has “remedial discretion” to impose sanctions for violations of its rules); *Towns of Concord, Norwood, and Wellesley v. FERC*, 955 F.2d 67, 71 (D.C. Cir. 1992) (agency has discretion under the Federal Power Act to order refunds for overcharges in violation of agency rules).

should also sanction and impose penalties on AT&T and other parties who violated those rules. While that may well be appropriate, the Commission can save that question for another day.<sup>93</sup>

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In conclusion, the Commission must act immediately to deny AT&T's petition, and must clarify that AT&T and other interexchange carriers must pay access charges both retroactively and prospectively for long distance services they provide using IP-in-the-middle. Whereas the factual predicate of AT&T's petition was that IP telephony services "represent [a] tiny fraction of interexchange calling," and therefore "will cause no cognizable harm to incumbents,"<sup>94</sup> this is clearly no longer the case. AT&T itself is "undergoing a massive transformation to VoIP."<sup>95</sup> MCI has likewise announced that it plans to "get 25 percent of our calls over an IP backbone by the end of the year," and "all of it over by 2005."<sup>96</sup> The "artificially-stimulated migration" about which AT&T itself warned is now a massive movement.<sup>97</sup> And it is imposing enormous costs on incumbent LECs, who have been terminating millions of minutes of traffic without proper compensation. The Commission must put an end to these unlawful practices that are undermining a central component of the Commission's existing regime for compensating local exchange carriers for the use of their networks.

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<sup>93</sup> See, e.g., *Verizon*, 269 F.3d at 1100-1101 (the question of whether retroactive liability exists is separate from the question of the appropriate sanctions that should be imposed, and the Commission may consider the later question separately).

<sup>94</sup> *AT&T Petition* at 32.

<sup>95</sup> *Eslambolchi Presentation* at 7.

<sup>96</sup> B. Charny, *Vint Cerf Hears VoIP Calling*, CNET News.com, <http://news.com.com/2008-1082-5073025.html> (Sept. 10, 2003).

<sup>97</sup> AT&T Comments in CC Docket No. 96-45 at 12 (FCC filed Jan. 26, 1998).